

RENDERED: MARCH 23, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002454-MR

MID-AMERICA INVESTMENT AND INSURANCE TRUST

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 90-CI-01207

ELIZABETH P. WRIGHT, COMMISSIONER,
KENTUCKY DEPARTMENT OF INSURANCE;
BENEFAX CORPORATION; NATIONAL BENEFIT
ADMINISTRATION, INC.; AND NATIONAL
BUSINESS ASSOCIATION TRUST

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BUCKINGHAM, COMBS, AND DYCHE, JUDGES.

DYCHE, JUDGE: Mid-America Investment and Insurance Trust appeals from an order of the Franklin Circuit Court determining that it is a single identity with the National Business Association Trust (NBAT), an entity placed into liquidation in June 1991 pursuant to a motion by the Kentucky Department of Insurance. The trial court's order further directs that the assets of Mid-America

Investment and Insurance Trust be placed into liquidation under the terms of the June 1991 order, and that its assets, including a \$100,000.00 certificate of deposit (CD), be transferred into the liquidation estate of NBAT. Because the trial court's determination that Mid-America Investment and Insurance Trust is a single identity with NBAT was not clearly erroneous, we affirm.

On August 1, 1982, the Mid-America Soft Drink Bottling Trust (Bottling Trust) was created. The trust originally operated as a health insurance trust for employees in the soft drink bottling industry and had relatively few participants. As of July 31, 1984, the financial statements of the Mid-America Soft Drink Bottling Trust reported, among other things, a CD in the amount of \$200,000.00. On August 1, 1984, appellant Mid-America Investment and Insurance Trust was created for the purpose of writing short-term disability benefits for employees of participating companies who were disabled by sickness or accident. Doug Walsh was the Fund Manager for both the Bottling Trust and Mid-America Investment and Insurance Trust.

On October 22, 1984, Walsh split the aforementioned \$200,000.00 CD held by the Bottling Trust into two \$100,000.00 CDs; one of the CDs was placed into an account belonging to the Bottling Trust, and the other was placed into a Mid-America Investment and Insurance Trust account. Eventually, on February 6, 1989, the \$100,000.00 Mid-America Investment and Insurance Trust CD was rewritten and moved into a new account with a new account number. The assets of Mid-America Investment and Insurance Trust, it appears, consist almost entirely of the

\$100,000.00 CD, now grown to approximately \$130,000.00, transferred to it in 1984 by the Bottling Trust.

On July 24, 1987, by a written Trust Agreement, the Bottling Trust was reformed into the National Business Association Trust (NBAT). It appears that, in substance, the reformation amounted to a name change. Subsequently, National Benefit Administrators, Inc. (NBA), was incorporated. NBA thereafter entered into a contract with NBAT to manage substantially all aspects of NBAT's insurance operations.

On June 1, 1990, due to the financial problems with the operation of NBAT by NBA, the Department of Insurance obtained a seizure order pursuant to KRS 304.33-120. The seizure order granted the Department control over all assets and records of NBAT. NBAT ceased doing business with approximately 4.6 million dollars in outstanding benefit claims and \$700,000.00 in assets.

On July 27, 1990, the Kentucky Department of Insurance filed an action in Franklin Circuit Court seeking liquidation of NBAT and NBA. The action alleged, among other things, that NBAT was operating as an unauthorized insurer; NBAT was or was about to become insolvent; and that assets were wrongfully diverted from NBAT to NBA. The action also sought relief against BeneFax Corporation, a company formed following the seizure, and which received by transfer various NBAT and NBA assets and which, further, was apparently formed to perform substantially the same functions formerly performed by NBA.

On June 20, 1991, the trial court entered an order directing the liquidation of NBAT; naming the Commissioner of the

Department of Insurance as the liquidator (Liquidator); authorizing and directing the Liquidator to take possession of the property of NBAT; and vesting the Liquidator with title to all property, contracts, rights of action, books, and records of NBAT, wherever located. This court affirmed in an unpublished opinion rendered March 5, 1993.

On May 10, 1995, upon motion of the Liquidator, the trial court entered an order directing the liquidation of NBA. The trial court determined NBA and NBAT to be a single entity and placed NBA under liquidation pursuant to the terms of the June 20, 1991, order liquidating NBAT. On July 24, 1997, the trial court entered an order consolidating the assets of NBA and NBAT into a single estate for liquidation purposes.

On July 13, 1999, the Commissioner of the Department of Insurance, as Liquidator of NBA and NBAT, filed a "Motion for Declaration of Rights and Turnover of Assets." The motion sought to, alternatively, (1) have Douglas C. Walsh and Citizens National Bank turn over in excess of \$130,000.00 in funds held in the name of Mid-America Investment and Insurance Trust to be a part of the liquidation estate of NBAT/NBA, or (2) to declare Mid-America Investment and Insurance Trust a single identity with NBAT. Thereafter, Mid-America Investment and Insurance Trust, by counsel, entered what it termed "a special entry of appearance" and filed a reply in opposition to the motion.

On September 7, 1999, a hearing was held, and on September 13, 1999, the trial court entered an order determining Mid-America Investment and Insurance Trust and NBAT to be a

single entity and ordering that the assets of Mid-America Investment and Insurance Trust be transferred to the liquidation estates of NBAT/NBA. This appeal followed.

First, Mid-America Investment and Insurance Trust contends that the trial court lacked jurisdiction over the person of Mid-America Investment and Insurance Trust and over the subject matter of the proceeding against Mid-America Investment and Insurance Trust.

In its August 23, 1999, response to the Insurance Commissioner's motion, Mid-America Investment and Insurance Trust identified itself as a "non-party to this action" and stated that it was making a "special entry of appearance . . . for the purpose of resisting the motion of the Liquidator[.]" Mid-America Investment and Insurance Trust did not, however, present specific jurisdictional arguments in the body of its reply; it responded to the Insurance Commissioner's arguments on the merits and filed a countermotion requesting that the trial court release its frozen assets.

Civil Rule 12.02 provides, in part, that

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (b) lack of jurisdiction over the person

Additionally, CR 12.08(1) states as follows:

A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in Rule 12.07, or (b) if it is neither made by motion

under Rule 12 nor included in a responsive pleading or an amendment thereof permitted by Rule 15.01 to be made as a matter of course.

First, while Mid-America Investment and Insurance Trust did, in its reply, identify itself as making a "special appearance," the distinction between the "general" and the "special" appearance has been eliminated by the Rules of Civil Procedure. First Nat. Bank of Cincinnati v. Hartmann, Ky. App., 747 S.W.2d 614, 615 (1988). Second, Mid-America Investment and Insurance Trust did not, in its reply or subsequent motion, comply with CR 12.02 by specifically asserting defenses based upon lack of personal jurisdiction. Third, the Mid-America Investment and Insurance Trust engaged in extensive discovery proceedings as well as litigating the action on its merits. An appearance has generally been found when a defendant has so participated in the action as to indicate an intention to defend. Smith v. Gadd, Ky., 280 S.W.2d 495 (1955). Consequently, it cannot now argue that the trial court had no jurisdiction over it. Williams v. Indiana Refrigerator Lines, Inc., Ky. App., 612 S.W.2d 350, 351 (1981) (citations omitted).

As to subject matter jurisdiction, without question, the Franklin Circuit Court has subject matter jurisdiction over this sort of insurance litigation. See KRS 304.33-040(3)(a); KRS 304.33-030(13).

Next, Mid-America Investment and Insurance Trust contends that the trial court erred in determining that it is a single identity with NBAT. In its September 13, 1999, order the trial court stated, "[i]t is hereby determined, based upon the

record before the Court, that the Mid-America Investment and Insurance Trust and National Business Association Trust is a single identity[.]” We agree.

Article II, Section 2, of the “Agreement and Declaration of Trust” creating Mid-America Investment and Insurance Trust states, in part, that

The Trust is hereby created for the purpose of holding all assets of the Plan for the benefit of the participating employees in accordance with the provisions of the Plan. In the event it ever develops that there are insufficient funds to cover the benefits prescribed by the Plan, or the funds shall be insufficient to meet the then obligations, the monies available shall be pro-rated and used for the benefits of the Employees or beneficiaries[.]

The term “Plan” as used in Article II, Section 2, is defined in Article I, Section 6, as follows:

The term “Plan” as used in this Agreement shall mean an employee benefit plan or plans adopted by the Employer to provide for the benefit of the Employees, group life, group accident & health, and dental insurance on such Employees, requiring use of the Trust for the funding and the payment of Plan benefits, and shall be called “the Mid-America Soft Drink Bottling Benefit Plan,” hereinafter referred to as “the M.A.S.D.B. Benefit Plan.”

The Agreement and Declaration of Trust creating NBAT contains, in every respect and particular, identical language in its respective Article I, Section 6, and Article II, Section 2, provisions.¹ In summary, together these sections define the

¹The same is true of the Agreement and Declaration of Trust creating NBAT’s predecessor, the Mid-America Soft Drink Bottling Trust.

purpose of Mid-America Investment and Insurance Trust and NBAT as sharing the common purpose of having been created for the purpose of holding the assets of the Mid-America Soft Drink Bottling Benefit Plan.

Further, it appears undisputed that the original source of the approximately \$130,000.00 primarily at issue in this case was by means of a transfer of a \$100,000.00 CD from NBAT's predecessor, the Bottling Trust, to Mid-America Investment and Insurance Trust in October 1984. Had that transfer, which was without any apparent consideration, not occurred, it follows that when the Bottling Trust was reformed into NBAT, the CD funds would have transferred into an NBAT account. It further follows that when the assets of NBAT were ordered to be transferred to the Liquidator, the CD would have been included within the assets transferred to the Liquidator.

In consideration (1) that the original source of the \$130,000.00 CD at issue was, in effect, NBAT (the successor company of the Bottling Trust, the "actual" source); (2) that Mid-America Investment and Insurance Trust and NBAT were created for the common purpose of holding the assets of the Mid-America Soft Drink Bottling Benefit Plan; and (3) that Article II, Section 6, of both trusts provide that "[i]n the event it ever develops that there are insufficient funds to cover the benefits prescribed by the Plan, or the funds shall be insufficient to meet the then obligations, the monies available shall be pro-rated and used for the benefits of the Employees or beneficiaries," we conclude that NBAT and Mid-America Investment

and Insurance Trust are, in reality, a single entity. We are persuaded that the trial court's findings were not clearly erroneous, and that it did not abuse its discretion in that determination.

Finally, Mid-America Investment and Insurance Trust contends that the Kentucky Department of Insurance's speculation regarding appellant's future is not grounds for use of Mid-America Investment and Insurance Trust funds in NBAT's liquidation. However, based upon our conclusion that the trial court correctly concluded that the Mid-America Investment and Insurance Trust and NBAT is a single entity, the disposition of this issue is moot. We will therefore not address it.

The judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Donald Duff
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Greg E. Mitchell
Thomas G. Grace
Andrew W. Green
Lexington, Kentucky